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**TRIAL CHAMBER VI**

**Before: Judge Chang-ho Chung, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public  
With Public Annex A**

**Prosecution's Observations on Reparations**

**Source: Office of the Prosecutor**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***  
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## Introduction

1. The Prosecution provides observations to assist the Chamber in determining the procedure and approach to be followed in the *Ntaganda* reparations proceedings.<sup>1</sup>
  
2. *First*, the Chamber should develop and supplement the principles established by the Appeals Chamber in the *Lubanga* case, adapting them to the characteristics of the *Ntaganda* case to reflect the harm suffered by the victims of the crimes for which Mr Ntaganda was convicted, in particular the harm and suffering of the victims of sexual and gendered-based crimes. *Second*, the Prosecution defers to the Chamber, the victims' observations and experts' advice on the criteria and methodology to determine the eligibility of victims, the relevant type and scope of harm suffered, and the scope of Mr Ntaganda's liability for the purposes of reparations. Regardless of the approach followed, it is important that the Chamber clarifies it from the outset. *Third*, the Prosecution considers that individual and collective reparations are both appropriate in the present case. *Finally*, and as already submitted,<sup>2</sup> the Prosecution respectfully submits that – as suggested by VPRS – the Chamber should render a preliminary decision setting out the procedure it will use in the reparations proceedings.

## Submissions

### **A. The Chamber should amend and/or supplement the principles established by the Appeals Chamber in the *Lubanga* case to reflect the characteristics of the Ntaganda case**

3. The “Principles on Reparations” established by the Appeals Chamber in the

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<sup>1</sup> In response to the invitation by the Single Judge of Trial Chamber VI (the “Chamber”): ICC-01/04-02/06-2447, para. 9(d) (“Order of 5 December 2019”).

<sup>2</sup> ICC-01/04-02/06-2429, para. 13 (“Response to VPRS Observations”).

*Lubanga* case<sup>3</sup> are generally applicable in the *Ntaganda* case. Nevertheless, the Chamber should develop and/or supplement these principles to adapt them to the characteristics and needs of the victims of the crimes for which Mr Ntaganda has been convicted,<sup>4</sup> in particular, to fully apprehend the diverse and far-ranging consequences of sexual and gender-based crimes in Ituri as well as the sensitivities and stigmas attached to them.<sup>5</sup> Consequently, a gender-sensitive approach at all stages of the reparations procedure<sup>6</sup> is necessary to adequately identify the harm suffered by the victims of these crimes, to satisfactorily measure these harms,<sup>7</sup> and to design types and modalities of reparations that effectively address them.<sup>8</sup>

4. In addition, reparations should not reinforce pre-existing patterns of subordination and discrimination for men and women;<sup>9</sup> rather, they should strive to have a transformative effect.<sup>10</sup> This factor should also be considered throughout the reparations proceedings, in particular, in selecting and designing the types and modalities of reparations,<sup>11</sup> and when distributing the reparation awards.<sup>12</sup>

<sup>3</sup> On 3 March 2015, the Appeals Chamber partially overturned Trial Chamber I's decision on reparations in the *Lubanga* case (ICC-01/04-01/06-2904: "*Lubanga* Reparations Decision") and amended Trial Chamber I's reparations order. See ICC-01/04-01/06 3129 A A2 A3 ("*Lubanga* Reparations AJ") and ICC-01/04-01/06-3129-AnxA A A2 A3 ("*Lubanga* Amended Order"), which contains the principles at paras. 1-52.

See *Lubanga* Reparations AJ, para. 3.

<sup>4</sup> *Lubanga* Amended Order, para. 5.

<sup>5</sup> UN Secretary General Guidance Note on Reparations for Conflict-Related Sexual Violence, June 2014 ("UN Guidance Note"), pp. 2-3 and 19 (on rehabilitation).

<sup>6</sup> Although the Appeals Chamber in *Lubanga* already required a gender-inclusive approach (*Lubanga* Amended Order, para. 18) and bore in mind the gender and age aspect in several principles (see e.g., paras. 17-19), additional and more detailed principles are necessary to fully capture and address the consequences of these crimes.

<sup>7</sup> UN Guidance Note, pp. 5, 17 (on compensation). Sexual violence can cause, among other consequences, loss of income and have serious consequences for the income potential of the victims. However, the damage may be difficult to quantify considering that often traditional women's work is at home looking after the family.

<sup>8</sup> UN Guidance Note, p. 17.

<sup>9</sup> See *Lubanga* Amended Order, para. 17, where this concept is already introduced, and para. 38 on compensation. See also Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation, March 2007 ("Nairobi Declaration"), principle 1B; UN Guidance Note, pp. 5, 8.

<sup>10</sup> UN Guidance Note, pp. 8-9; Nairobi Declaration, principles 1D and 3H. See also *Lubanga* Amended Order, para. 34.

<sup>11</sup> UN Guidance Note, p. 5.

<sup>12</sup> UN Guidance Note, pp. 5, 16. See also Nairobi Declaration, principle 2E.

## **B. Criteria and methodology to be applied in the determination and assessment of eligible victims, relevant harm, and Mr Ntaganda's liability**

### **i. Identification of eligible victims**

*Victims may be direct and indirect, natural and legal persons, and communities*

5. Victims eligible for reparations are those who have suffered harm as a result of the crimes for which Mr Ntaganda was convicted.<sup>13</sup> They can be direct victims (those whose harm was the result of the commission of the crimes) and indirect victims (those who suffered harm as a result of the harm suffered by direct victims),<sup>14</sup> and may include both natural and legal persons.<sup>15</sup>

6. The categories of indirect victims identified by the Appeals Chamber in the *Lubanga* case appear applicable to this case.<sup>16</sup> Thus, in determining whether a person is a family member of a direct victim (and thus a potential indirect victim), the Chamber should consider the social and familial structures applicable in Ituri, bearing in mind that the concept of “family” may have many cultural variations.<sup>17</sup> In particular, the existence of a close personal relationship should not be limited to that between parents and children.<sup>18</sup>

<sup>13</sup> ICC-01/04-02/06-2359, para. 1199 (“*Ntaganda TJ*”).

<sup>14</sup> *Lubanga* Amended Order, para. 6. *See also* para. 7 on the need to consider the applicable social and familial structures in defining “family”. On the definition of direct and indirect victims, *see* ICC-01/04-01/06-1813, para. 44.

<sup>15</sup> Rule 85(b); *Lubanga* Amended Order, para. 8.

<sup>16</sup> *Lubanga* Amended Order, para. 6; ICC-01/04-01/07-3728, para. 39 (“*Katanga Reparations Order*”).

<sup>17</sup> *Lubanga* Amended Order, para. 7. *See for example* ECCC Appeal Judgment in the *Kaing Guek Eav alias Duch* case, 3 February 2012, para. 562: “[...] the Trial Chamber was correct to articulate the requirement of special bonds of affection or dependence between a direct victim and the claimed indirect victim. This Chamber has further held that close family members may be presumed to have had such bonds. As to what constitutes a close family is context dependent. In the Cambodian context large families live together and form ties connecting immediate and non-immediate family members. By Western standards, grown-up family members do not usually co-habit with their parents or siblings; families are atomized, smaller and economically autonomous. Lack of co-habitation, however, does not preclude bonds of affection, especially within small families, where exclusivity of these bonds may render them strong.” *Emphasis added.*

<sup>18</sup> ICC-01/04-01/06-1432 OA9 OA10, para. 32 (“*Lubanga Victims Participations AJ*”) where the Appeals Chamber found that the relation between parents and children is an example of “close personal relationship”.

7. In addition, collective reparations may also be awarded to a community, understood as a group of victims,<sup>19</sup> as long as there is a sufficient causal link between the harm suffered by members of that community and the crimes for which Mr Ntaganda is found guilty.<sup>20</sup>

8. The Trial Judgment and the Sentencing Judgment provide guidance to identify the collective of victims of Mr Ntaganda's crimes. These decisions identify some of the victims<sup>21</sup> and describe the temporal and geographical parameters within which the crimes were committed.<sup>22</sup>

*The Prosecution defers to the Chamber on the methodology to identify the victims*

9. The Chamber may either choose to identify in the Reparations Order the victims eligible to benefit from reparations (and rule on the requests for reparation under rule 94 if it decides to request them), or more appropriately if the Chamber orders collective reparations,<sup>23</sup> only set out the criteria of eligibility for such victims in the Reparations Order and entrust the Trust Fund for Victims ("TFV") to identify the beneficiaries at the implementation stage.<sup>24</sup> VPRS seems to endorse the former approach.<sup>25</sup> ICC Chambers have adopted different approaches depending on the case.<sup>26</sup> In any event, and as recently confirmed by the Appeals

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This finding does not exclude other relations which, considering the circumstances of the case and context, also may constitute "close personal relationships". See also *Katanga* Reparations Order, para. 113.

<sup>19</sup> See e.g., ICC-01/12-01/15-171 ("Al-Mahdi Judgment and Sentence"), paras. 78-80.

<sup>20</sup> *Lubanga* Reparations AJ, paras. 211-212, 214. Other members of the affected communities could benefit from activities undertaken by the TFV in relation to its assistance mandate. See *Lubanga* Reparations AJ, para. 215 and *Lubanga* Amended Order, para. 55.

<sup>21</sup> *Ntaganda* TJ, paras. 737, 746, 873-874, 943, 546, 587, 601, 629, 940, 622-623, 907-908, 960, 629, 974, 410-411, 898-899, 978-980, 179, 202, 362, 409, 969, 1120, 600; *Ntaganda* Sentencing Judgment, paras. 40, 41, 90-93, 98, 160.

<sup>22</sup> *Ntaganda* TJ, paras. 33, 39-42.

<sup>23</sup> In *Lubanga*, the Appeals Chamber found that the Trial Chamber was not required to rule on the individual applications for reparations because a collective award was made pursuant to rule 98(3): *Lubanga* Reparations AJ, paras. 148-157.

<sup>24</sup> *Lubanga* Reparations AJ, para. 205. See also para. 32; *Katanga* Reparations Order, para. 293; ICC-01/12-01/15-236, para. 104.

<sup>25</sup> VPRS Observations, para. 11.

<sup>26</sup> In *Katanga*, the Trial Chamber identified a bounded set of 297 victims (out of 341 applicants) entitled to reparations (*Katanga* Reparations Order, paras. 33, 168-80); in *Al-Mahdi*, the Trial Chamber rejected the

Chamber, the identity and total number of victim beneficiaries need not be identified prior to issuing the reparations order<sup>27</sup> and the reasonableness of a Trial Chamber's chosen approach depends on the characteristics of each case.<sup>28</sup> For example, an application-based approach could be appropriate in certain cases, such as if there are a small number of victims and it is clear that nearly all have filed requests for reparations.<sup>29</sup> Conversely, in other cases such as in *Lubanga*, where there were uncertainties over the number of victims and a limited number of applications were received, this approach may not be suitable.<sup>30</sup> Indeed, if the *Lubanga* reparations Trial Chamber would have been limited to assessing harm suffered only by victims who submitted requests for reparation, it would not have been able to consider the totality of the harm caused,<sup>31</sup> and the proceedings would have been inefficient since the Trial Chamber would have had to wait until all victims applied for reparations before finalising the reparations award.<sup>32</sup>

10. However, and regardless of the approach taken by the Chamber, it should bear in mind that all beneficiary victims must be assessed against the same criteria.<sup>33</sup>

11. Finally, if the Chamber decides to request rule 94 applications, the Prosecution notes that in prior cases, victims applying to receive reparations could

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arguments that harm and associated liability could only be determined on the basis of the 139 individual victim applications before the Chamber, and that the Chamber needed to identify and approve the victim beneficiaries and delegated the identification of the victims to the TFV (ICC-01/12-01/15-236, *Al-Mahdi* Reparations Order, paras. 144-46); in *Lubanga*, Trial Chamber II individually reviewed 473 identified victims' eligibility to access collective reparations. Rather than limit its assessment to these identified individuals, Trial Chamber II determined that the identified victims comprised only a sample of a larger pool of people who could be entitled to reparations. For a comparative analysis of the different reparation proceedings at the ICC: see *EJIL: Talk*, [Five Procedural Takeaways from the ICC's 18 July 2019 Lubanga Second Reparations Judgment](#); and [Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC's 15 December 2017 Lubanga Reparations Decision](#).

<sup>27</sup> ICC-01/04-01/06-3466-Red , paras. 87-89, 92, 330 ("*Lubanga* Second Reparations AD").

<sup>28</sup> *Lubanga* Second Reparations AD, paras. 86-87, 142.

<sup>29</sup> *Lubanga* Second Reparations AD, para. 86.

<sup>30</sup> *Lubanga* Second Reparations AD, para. 92.

<sup>31</sup> *Lubanga* Second Reparations AD, para. 79.

<sup>32</sup> *Lubanga* Second Reparations AD, para. 81.

<sup>33</sup> *Lubanga* Second Reparations AD, paras. 168-169. See also ICC-01/12-01/15-259-Red2 ("*Al-Mahdi* Reparations AD"), para. 56. See also VPRS Observations, fn. 50.

“use official and unofficial documents, or any other means of demonstrating their identities.”<sup>34</sup> In the absence of acceptable documentation, “a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf is acceptable”.<sup>35</sup>

## **ii. The relevant harm**

### *Type and scope of harm and their identification in the Reparations Order*

12. As the Appeals Chamber has noted, “harm” may be understood as “hurt”, “injury” or “damage”.<sup>36</sup> In its nature, the harm may be “material”, “physical” or “psychological”.<sup>37</sup> Natural persons may suffer direct or indirect harm, and legal persons may suffer direct harm.<sup>38</sup> In all cases, the harm must be “personal to the victim” in the sense that the victim was (or still is) himself or herself adversely affected by it, although not necessarily uniquely so.<sup>39</sup>

13. In the Reparations Order, the Chamber should clearly define the harm suffered by direct and indirect victims that have resulted from the crimes for which Mr Ntaganda has been convicted.<sup>40</sup> As to the scope of harm, the Chamber may either choose to itself assess and determine the extent of the harms suffered (with or without the assistance of experts<sup>41</sup>) and to specify the size and nature of the reparations award in the Order<sup>42</sup> or instead, may delegate such an assessment to the TFV and only set out the criteria to be applied by the TFV in making this

<sup>34</sup> *Lubanga* Amended Order, para. 57. See also *Katanga* Reparations Order, paras. 55-56.

<sup>35</sup> *Lubanga* Amended Order, para. 57. See also *Katanga* Reparations Order, paras. 71, 103.

<sup>36</sup> *Lubanga* Victims Participations AJ, para. 31. *Lubanga* Amended Order, para. 10.

<sup>37</sup> *Lubanga* Victims Participations AJ, para. 32. *Lubanga* Amended Order, para. 10.

<sup>38</sup> ICC Rules Procedure and Evidence (“ICC Rules”), rule 85(b).

<sup>39</sup> *Lubanga* Victims Participations AJ, para. 39. *Lubanga* Amended Order, para. 10.

<sup>40</sup> *Lubanga* Reparations AJ, paras. 181, 184.

<sup>41</sup> ICC Rule 97(2).

<sup>42</sup> *Lubanga* Reparations AJ, fn. 231.

assessment.<sup>43</sup> The Chamber would then approve the TFV's Draft Implementation Plan – which the Chamber must then approve.<sup>44</sup>

14. The Prosecution defers to the Victims' submissions, and eventual experts' observations, to assist the Chamber in determining the specific type and the extent of the harm suffered in this case.<sup>45</sup> The Trial Judgment, and in particular the Sentencing Judgment, provide guidance on the diverse, extensive and long-lasting harm resulting from the crimes for which Mr Ntaganda was convicted:

(i) the murders irreversibly impacted not only the direct victims but also those who witnessed them, and the direct victims' family members and relatives left behind,<sup>46</sup> who were deprived of a family member, and thereby of love and care, and, depending on the situation, of support, be it financial, physical, emotional, psychological, moral, or otherwise;<sup>47</sup>

(ii) victims of rape and sexual slavery suffered physical, psychological, psychiatric and social consequences (ostracisation, stigmatisation and social rejection), both in the immediate and longer term. Some of the effects were also experienced by the victims' family members and communities;<sup>48</sup>

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<sup>43</sup> *Lubanga* Reparations AJ, paras. 183-184.

<sup>44</sup> On the Trial Chamber's approval of the Draft Implementation Plan, see TFV Regulations, regulations 54-57 and 69. Although in *Lubanga* the Trial Chamber only awarded collective reparations, the Appeals Chamber indicated that this approach was also possible for individual reparations. See *Lubanga* Reparations AJ, para. 183. Although not expressly stated, the Appeals Chamber would have referred to individual reparations through the TFV pursuant to rule 98(2), which are regulated in regulations 59 to 68 of the TFV Regulations.

<sup>45</sup> In *Lubanga*, the Appeals Chamber noted that a Trial Chamber need not limit to the harms identified in the Judgment and Sentencing Decision and could make findings of harms for which reparations may be awarded in the Reparations Order based on evidence under regulation 56 (it does not appear that such evidence was elicited at trial), evidence provided by experts, Parties and participants in a reparations hearing or written submissions, or evidence contained in rule 94 applications: *Lubanga* Reparations AJ, para. 185.

<sup>46</sup> *Ntaganda* Sentencing Judgment para. 52.

<sup>47</sup> *Ntaganda* Sentencing Judgment para. 44.

<sup>48</sup> *Ntaganda* Sentencing Judgment para. 102.

(iii) victims of destruction of property suffered from the loss of a private place, a shelter and a sense of security;<sup>49</sup>

(iv) victims of pillaging suffered loss of property (which, in certain instances, amounted to all belongings of the victims) including livelihood and availability of food until new crops would have grown and could be harvested;<sup>50</sup>

(v) the attacks against protected objects caused the victims to suffer from deprivation of medical care;<sup>51</sup>

(vi) the effect of victims of displacement having to leave their homes against their will caused them harm;<sup>52</sup>

(vii) the children conscripted, enlisted and/or used in hostilities are left with life-long physical, psychological, material and social scars.<sup>53</sup>

*Standard of proof of the causal link and causation standard*

15. The applicant victims have the burden of proving the link between the crimes for which Mr Ntaganda was convicted and their harm. The “appropriate” standard—and also what is “sufficient” for an applicant to meet the burden of proof—will depend upon the circumstances of the specific case, including with reference to difficulties encountered by the victims in obtaining evidence in support of their claim.<sup>54</sup> Given the fundamentally different nature of reparations proceedings, the standard need not be the criminal standard of proof “beyond

<sup>49</sup> *Ntaganda* Sentencing Judgment para. 137.

<sup>50</sup> *Ntaganda* Sentencing Judgment paras. 139, 140.

<sup>51</sup> *Ntaganda* Sentencing Judgment paras. 156, 138, 144. The Chamber stressed the gravity of the crime and noted the aggravating circumstance that the patients were left without medical care as a result of the attack on the hospitals.

<sup>52</sup> *Ntaganda* Sentencing Judgment para. 162.

<sup>53</sup> *Ntaganda* Sentencing Judgment para. 184.

<sup>54</sup> *Lubanga* Reparations AJ, para. 81 confirming *Lubanga* Reparations Decision, paras. 251-252. See also *Lubanga* Amended Order, para. 22.

reasonable doubt”<sup>55</sup> and it may generally be appropriate to require proof on the “balance of probabilities”, as in the prior cases.<sup>56</sup>

16. The standard of causation must likewise be determined in light of the particular circumstances of a case.<sup>57</sup> Thus, the Chamber should consider the difficulties in linking the harm suffered to the crimes considering the multi-layered nature of the harms, the fact that the harms may have merged with other instances of harm and the time elapsed. As in prior cases, the Chamber may also want to require a “but for” and “proximate cause” relationship.<sup>58</sup>

**iii. The scope of Mr Ntaganda’s liability, including the precise extent of the (monetary) obligations to be imposed on him**

17. As found by the Appeals Chamber in the *Lubanga* case, the Chamber must determine the scope of Mr Ntaganda’s liability for reparations in the Reparations Order.<sup>59</sup>

18. In making this determination, the Chamber should take into account the cost of reparations considered to be appropriate and that are intended to be put in place (including reparations programmes) and the different harms suffered by the victims, both individual victims (direct and indirect) and collective of victims<sup>60</sup>.

19. The Prosecution defers to the Victims’ submissions, and to the relevant expert advice, to assist the Chamber in determining the scope of Mr Ntaganda’s liability for reparations, which should be higher than the USD 10,000,000 awarded in the

<sup>55</sup> *Lubanga* Amended Order, para. 22.

<sup>56</sup> *Lubanga* Reparations AJ, para. 83; *Lubanga* Amended Order, para. 65; ICC-01/04-01/07-3778-Red, para. 42 (“*Katanga* Reparations AD”).

<sup>57</sup> *Lubanga* Reparations AJ, para. 80.

<sup>58</sup> *Lubanga* Reparations Decision, para. 250 upheld in *Lubanga* Reparations AJ, paras. 124-129 and *Lubanga* Amended Order, para. 59; *Katanga* Reparations AD, para. 49; *Al-Mahdi* Reparations Order, para. 44.

<sup>59</sup> *Lubanga* Reparations AJ, paras. 237.

<sup>60</sup> *Lubanga* Second Reparations AD, para 108.

case against Mr Lubanga.<sup>61</sup> Further, the Trial Judgment and the Sentencing Judgment are of guidance and show that Mr Ntaganda caused diverse, extensive and long-lasting harm to his victims. Notably, although not all may be entitled to reparations,<sup>62</sup> 2,132 victims are authorised to participate in the proceeding.<sup>63</sup> Moreover, Mr Ntaganda's participation in the commission of the crimes and his criminal liability are of serious gravity.

20. Indeed, Mr Ntaganda was found guilty of committing five counts of crimes against humanity and thirteen counts of war crimes, both as a direct perpetrator and as an indirect co-perpetrator.<sup>64</sup> In particular, (i) he was the Deputy Chief of Staff in charge of Operations and Organisation of the UPC/FPLC until the end of the period under examination (8 December 2003) and his role was determinative in setting up a strong military group capable of driving out from certain areas all Lendu civilians;<sup>65</sup> (ii) he devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operation;<sup>66</sup> (iii) he gave orders to commit crimes and personally engaged in violent conduct towards the enemies;<sup>67</sup> (iv) he had the power to frustrate the crimes and his contribution was essential;<sup>68</sup> (v) he failed to prevent others from committing criminal acts against the Lendu;<sup>69</sup> (vi) and notably crimes such as rape, the killing of a Lendu or the looting of Lendu property were not considered

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<sup>61</sup> ICC-01/04-01/06-3379-Red-Corr, para. 281; *Lubanga* Second Reparations AD, para. 331.

<sup>62</sup> VPRS Observations, para. 6 and fn. 7 (noting that 18 municipalities included in the confirmation decision were not included in the Judgment).

<sup>63</sup> VPRS Observations, para. 5.

<sup>64</sup> *Ntaganda* TJ, pp. 535-539. Mr Ntaganda was convicted as a direct perpetrator of the murder and persecution of one individual as crimes against humanity and as war crimes, and as an indirect co-perpetrator of all other crimes (including murder and persecution of other individuals).

<sup>65</sup> *Ntaganda* TJ, paras. 764, 827-833; *Ntaganda* Sentencing Judgment, para. 60.

<sup>66</sup> *Ntaganda* TJ, paras. 767, 834-846; *Ntaganda* Sentencing Judgment, paras. 61-65.

<sup>67</sup> *Ntaganda* TJ, paras. 847-851.

<sup>68</sup> *Ntaganda* TJ, paras. 856-857.

<sup>69</sup> *Ntaganda* TJ, paras. 332 and 857; *Ntaganda* Sentencing Judgment, para. 216.

punishable offences within the UPC/FPLC.<sup>70</sup> Accordingly, his liability for reparations should reflect the gravity of his actions.

21. The Chamber may be inclined to consider any overlap in reparations due to the fact that Mr Lubanga was found liable for reparations for some of the same victims of the enlistment, conscription and use of child soldiers under 15 years old to participate actively in hostilities in Ituri from early September 2002 to 13 August 2003.<sup>71</sup> However, this consideration should have no meaningful impact in determining Mr Ntaganda's overall liability, even to the same victims. This is because of the wider scope of the harm caused by Mr Ntaganda's crimes both in terms of the distinct rape and sexual slavery convictions related to some of the children recruited and used by his armed group<sup>72</sup> and in terms of the high number of additional crimes for which Mr Ntaganda was convicted overall.

**C. The types and modalities of reparations and factors relating to the appropriateness of awarding reparations on an individual or a collective basis or both**

22. The Prosecution defers to the Victims, the TFV and other expert advice to assist the Chamber in determining the appropriate types and modalities of reparations in this case.<sup>73</sup> However, and in light of the criteria set out in rules 97(1) and 98(3), the Chamber should at least consider the following factors:

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<sup>70</sup> *Ntaganda* Judgment, para. 332.

<sup>71</sup> *Katanga* Reparations AD, para. 180; ICC-01/04-01/06-2842, para. 1358.

<sup>72</sup> *Ntaganda* TJ, paras. 974-975, 978-980.

<sup>73</sup> In the Reparations Order, the Chamber must at a minimum identify the modalities of reparations that are appropriate to the circumstances of this case. If the Chamber chooses not to determine the nature and size of the award for reparations in the Order, the TFV will design the award at the implementation stage on the basis of the modalities identified by the Chamber in the Order. *See Lubanga* Reparations AJ, para. 200. This would apply in the event of individual and collective reparations through the TFV pursuant to rule 98(2) and (3).

- the large number of victims who may apply for – and be entitled to – reparations<sup>74</sup> (as noted above, 2,132 victims have been authorised to participate in the proceedings);
- the number of victims identified by the Chamber in the Trial Judgment and Sentencing Judgment is large<sup>75</sup> (for example, the Chamber found that at least 73 persons were killed and five were victims of attempted murder;<sup>76</sup> it also found that at least 21 persons were raped;<sup>77</sup> in addition, it found that three persons under 15 years of age were raped and that two of them were also victims of additional sexual crimes;<sup>78</sup> the Chamber further found that pillage was committed on a significant scale,<sup>79</sup> one health centre was attacked,<sup>80</sup> civilians were attacked in five locations,<sup>81</sup> a significant number of persons were forcefully transferred from five localities,<sup>82</sup> and houses and buildings in or around eight different towns and villages were destroyed on a significant scale);<sup>83</sup>
- whether Mr Ntaganda disposes of funds and properties;<sup>84</sup>
- the serious, multiple, long-lasting and diverse consequences of the harms inflicted upon the victims of conflict-related sexual violence and on children victims of the crimes, as well as the persons deprived of the love and care of their relatives, expelled from their homes and/ or

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<sup>74</sup> 2,132 victims were authorised to participate at trial: *see* VPRS Observations, para.6.

<sup>75</sup> *Ntaganda* TJ, para. 1199.

<sup>76</sup> *Ntaganda* Sentencing Judgment para. 47. In addition, the Chamber made broader findings of murders of unquantified numbers of persons.

<sup>77</sup> *Ntaganda* Sentencing Judgment para. 98. In addition, the Chamber made broader findings of rape of unquantified numbers of persons.

<sup>78</sup> *Ntaganda* Sentencing Judgment paras. 92-93, 108.

<sup>79</sup> *Ntaganda* Sentencing Judgment para. 140.

<sup>80</sup> *Ntaganda* Sentencing Judgment para. 140; *Ntaganda* TJ, paras. 526, 609.

<sup>81</sup> *Ntaganda* Sentencing Judgment para. 56.

<sup>82</sup> *Ntaganda* Sentencing Judgment para. 160.

<sup>83</sup> *Ntaganda* Sentencing Judgment paras. 145-146.

<sup>84</sup> For the purposes of compensation, the Chamber should consider, *inter alia*, if in view of the availability of funds, compensation is feasible. *See Lubanga* Amended Order, para. 37. *See* ICC-01/04-02/06-2367-Conf.

witnesses to the destruction of their homes and looting of their belongings.

23. Because of the foregoing, a combination of individual and collective reparations, complementing each other,<sup>85</sup> and including at least compensation,<sup>86</sup> rehabilitation<sup>87</sup> and, if possible, restitution,<sup>88</sup> appears suitable to address the consequences of the crimes for which Mr Ntaganda has been convicted.<sup>89</sup> Indeed, the Inter-American Court of Human Rights (“IACtHR”) has resorted to both collective and individual awards to address mass human rights violations.<sup>90</sup> In addition, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has advocated for reparations programs which include different kinds of benefits to allow for a better response to—and to better redress—the different types of harm that a particular violation can generate.<sup>91</sup>

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<sup>85</sup> UN Guidance Note, p. 7.

<sup>86</sup> Compensation appears as an adequate modality of reparation for the victims of this case, considering the physical and/or mental harm suffered; material damage; loss of earnings; lost opportunities; costs of legal or other relevant experts, medical services, psychological and social assistance. *See Lubanga Amended Order*, para. 40. *See also* UN Basic Principles, principle 20; UN Guidance Note, pp. 16-17.

<sup>87</sup> Rehabilitation also appears adequate in this case and could include, *inter alia*, the provision of medical services and healthcare, psychological, psychiatric and social assistance and any other relevant legal and social services. *See Lubanga Amended Order*, para. 42. *See also* UN Basic Principles, para. 21; UN Guidance Note, pp. 18-19; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence A/69/518, 14 October 2014 (“Special Rapporteur Report”), paras. 35-37.

<sup>88</sup> *Lubanga Amended Order*, paras. 35-36. *See also* UN Basic Principles, principle 19 and UN Guidance Note, pp. 15-16. The Prosecution defers to expert submissions on the feasibility of restitution in this case. Although theoretically feasible for pillaging and destruction of property, the context and the time elapsed may make restitution impossible. In *Lubanga*, the TFV considered that restitution was not feasible. *See* ICC-01/04-01/06-3177-Red, paras. 191-193.

<sup>89</sup> The Trial Chamber may want to further explore with the Victims the adequacy of other modalities of reparations, such as symbolic measures of satisfaction (apologies, commemorations and/or the building of monuments). These measures have been rarely used specifically to help repair the harm caused to victims of conflict-related sexual violence and, when they have been used, they have often reinforced existing stereotypes. *See* UN Guidance Note, pp. 17-18.

<sup>90</sup> *Case of Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 29 March 2006, paras. 210, 218, 224-227. *See also Case of Moiwana Community v. Suriname*, Judgment, 15 June 2005, paras. 187, 194, 196, 202-208.

<sup>91</sup> Special Rapporteur Report, paras. 29-31; Nairobi Declaration, 3E.

#### **D. Preliminary Decision setting out the reparation procedure**

24. As also previously noted, the Prosecution respectfully submits that it is important that the Chamber clearly indicates from the outset in a preliminary decision the approach that it would adopt in the reparations proceedings. Notably: (i) whether participating victims will be required to submit applications anew;<sup>92</sup> (ii) whether it will decide on each individual application for reparations, if it chooses to request them, or whether it would delegate that decision;<sup>93</sup> (iii) the type of information that it intends to rely on when determining the reparations award;<sup>94</sup> and (iv) the manner in which it will assess the relevant information, including the standard of proof it will apply and the applicable standards on the requisite causal nexus between the harm and Mr Ntaganda's crimes.<sup>95</sup> The Chamber may also consider to order the reparations award through the TFV to an intergovernmental, international or national organization approved by the TFV pursuant to rule 98(4) of the Rules.

25. Furthermore, the Prosecution reiterates that it is important for the Chamber to ensure all victims (participating victims and new beneficiaries) are assessed against the same criteria.<sup>96</sup>

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<sup>92</sup> Response to VPRS Observations, para. 9.

<sup>93</sup> Response to VPRS Observations, para. 9.

<sup>94</sup> Response to VPRS Observations, para. 10.

<sup>95</sup> Response to VPRS Observations, para. 11.

<sup>96</sup> *Lubanga* Second Reparations AD, paras. 168-169. *See also Al-Mahdi* Reparations AD, para. 56. *See also* VPRS Observations, fn. 50.

## Conclusion

26. The Prosecution respectfully requests the Chamber to consider these observations.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 28<sup>th</sup> day of February 2020  
At The Hague, The Netherlands